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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of JAVIER and LOURDES
BETANCOURT.

2d Civil No. B216329
(Super. Ct. No. D 317439)
(Ventura County)

JAVIER BETANCOURT,

Appellant,

v.

LOURDES BETANCOURT,

Respondent.

Javier Betancourt appeals from an order denying his request for a five-year domestic violence restraining order against respondent Lourdes Betancourt. We affirm.

Facts and Procedural History

Javier Betancourt and Lourdes Betancourt were divorced on September 19, 2006. At the time of the divorce, they had three minor children. Lourdes¹ was given primary physical custody of the children. The eldest child was killed in an automobile accident in Mexico. Javier blamed Lourdes for the child's death and filed an order to show cause seeking sole custody of the remaining two children. After the custody

¹ We refer to the parties by their first names for clarity. No disrespect is intended.

hearing on March 18, 2008, Lourdes hit Javier in the face as they were exiting the courtroom.

The next day, Javier filed a request for a domestic violence restraining order. Lourdes filed no opposition to the order. The trial court issued the order on March 20 and reissued it several times. On August 18, 2008, the court denied Javier's request for sole custody of the children. Lourdes retained primary physical custody and Javier was granted limited visitation pending a further hearing on November 4, 2008. The court refused to issue a further restraining order.

On November 4, 2008, a further hearing on custody and visitation was held. The court issued a ruling on December 19, 2008, granting permanent physical custody to Lourdes and visitation to Javier. In the order, the court set forth its reasons for granting the previous restraining order and denying Javier's request for a five-year order:

"On July 2, 2008 this court found that mother had committed an act of domestic violence against father while in, or on the way out of, Courtroom 34 of the above-entitled court on March 13, 2008. The court notes that the finding was based on a strict reading of the domestic violence statutes; that is, 'abuse' as defined in the statute occurred and the 'relationship' as defined in the statute existed. In its ruling, the court also noted that 'the circumstances of the incident are disturbing in many respects. Specifically, and possibly without the intent to do so, the court finds that by his own inappropriate actions and according to his own testimony [father] contributed to the March 13th incident.' In particular, only 2 1/2 months earlier the parties had lost their son in a car accident. Both parties were in severe grief. It was clear, and it remains clear, that father 'blames' mother for the son's death. Testimony indicated that in open court on March 13th father called mother a prostitute, he said she was a bad person, he alleged that she had threatened to kill him, and he gave the impression to the judge that somehow mother was responsible for the son's death. Testimony indicated that on the way out of Department 34 mother confronted him with questions as to how he could say those things in open court about her, things which were not true. In response father told her she was a prostitute and apparently that is when the slap occurred.

".....

"Father testified that mother is a dangerous person and he is afraid of her. He indicated that there were numerous incidents during the marriage when she either struck him or threw things at him. . . .

".....

"On rebuttal mother testified that on numerous occasions father asked her to get back together and marry him after separation. She said that he told her she was a great woman and an excellent mother. She said that during the marriage she never hit him and she never threw things at him. She testified that during the marriage he did strike her one time and broke her nose. She continues to have a deviated septum.

"Father denied striking mother."

On appeal Javier argues the court erred in refusing to grant a five-year injunction because Family Code section 6345 permits such orders "without a showing of any further abuse since the issuance of the original order" and Javier had a reasonable apprehension of future abuse. Lourdes did not file a respondent's brief.²

Discussion

Standard of Review

Where, as here, the renewal of a protective order is contested, the court should renew the order "if, and only if, it finds by a preponderance of the evidence that the protected party entertains a 'reasonable apprehension' of future abuse." (*Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1290.) This standard "only means the evidence demonstrates it is more probable than not there is a sufficient risk of future abuse to find the protected party's apprehension is genuine and reasonable." (*Ibid.*)

² When no respondent's brief is filed, we decide the appeal on the record, the opening brief, and any oral argument by appellant. (Cal. Rules of Court, rule 8.220(a)(2).) A respondent's failure to file a brief does not require an automatic reversal. (*In re Marriage of Davies* (1983) 143 Cal.App.3d 851, 854.) Notwithstanding the respondent's silence, the appellant still has the affirmative burden to show error. Therefore, this court reviews the record and reverses only if prejudicial error is found. (*Ibid.*)

*The Court Properly Denied Husband's Request
For Renewal of the Protective Order*

Family Code section 6345, found in the Domestic Violence Prevention Act (§ 6200 et seq.), states in relevant part: "(a) In the discretion of the court, the personal conduct, stay-away, and residence exclusion orders contained in a court order issued after notice and a hearing under this article may have a duration of not more than five years, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. These orders may be renewed, upon the request of a party, either for five years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party."

In the leading case interpreting Family Code section 6345, *Ritchie v. Konrad*, *supra*, 115 Cal.App.4th 1275, the court cautioned: "[T]he mere existence of a protective order, typically issued several years earlier, seldom if ever will provide *conclusive* evidence the requesting party entertains a 'reasonable apprehension' of future abuse of any kind should that order expire. But the existence of the initial order certainly is relevant and the underlying findings and facts supporting that order often will be enough in themselves to provide the necessary proof to satisfy that test." (*Id.* at p. 1291.)

Here, in arguing that the order should be renewed, Javier relied solely on the March 13, 2008, incident. As contemplated by *Ritchie*, the trial court explained its reasons for not renewing the order after hearing extensive testimony from Javier and Lourdes and their family members.

The initial restraining order was based on a single incident occurring during an angry moment shortly after the death of the eldest child. It was issued based only on Javier's version of events. At the hearing on renewal of the order, Lourdes' testimony revealed she slapped Javier in the face after he called her a "prostitute" and accused her of causing the death of their son. She also stated that, during the marriage, Javier hit her and broke her nose. Javier could point to no further incidents or threats of violence

occurring after issuance of the initial order to support a "reasonable apprehension" of future violence.

Javier's claim that there is evidentiary support for renewing the order is nothing more than a request for us to reweigh the evidence, and that we cannot do. Credibility determinations are made by the trial court, not us. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The order is affirmed. The parties shall bear their own costs on appeal.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Brian J. Back, Judge
Superior Court County of Ventura

Susan H. Ratzkin for Appellant.

No appearance for Respondent.